

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DIGENE CORPORATION,

Plaintiff,

v.

THIRD WAVE TECHNOLOGIES, INC.,

Defendant.

ORDER

3:07-cv-00022-bbc

Plaintiff Digene Corporation has moved to strike certain parts of a declaration of defendant Third Wave Technologies' expert witness, Joshua Gans. Defendant opposes the motion and has interposed its own motion to strike declarations filed by plaintiff's expert, Jonathan Putnam.

After reviewing the parties' briefs and the expert reports and declarations, I conclude that the following paragraphs of Gans's declaration should be struck: 32, 66, 88, 91-93 and 107. These paragraphs deal with material that could have been disclosed in Gans's initial report. They are not new material, properly supplemental or rebuttal. However, the remaining paragraphs that plaintiff challenged do fall into one of these categories and will not be struck.

As to Putnam's various declarations, defendant's motion to strike will be denied. In its initial brief in support of its motion to strike, defendant argued simply that Putnam had filed too many declarations. Fair comment, but not a good reason to strike the declarations if in fact they were properly rebuttal or supplemental. Instead of explaining initially why they might be improper, defendant waited until the reply brief to identify its particular objections. This was too late. Plaintiff had no chance to respond to the objections.

Defendant's omission does not prejudice it. Its main objections to Putnam's declarations are essentially of the sauce for the gander variety: If Gans's report is to be stricken in any respect, then Putnam's should be struck as well. Since I am striking little of Gans's report, defendant has no real ground for objection.

In any event, my review of Putnam's declarations persuades me that they contain rebuttal and supplemental materials that are properly submitted under Rule 26.

ORDER

IT IS ORDERED that plaintiff Digene Corporation's motion to strike portions of the declaration of Joshua Gans is GRANTED with respect to paragraphs 32, 66, 88, 91-93 and 107. In all other respects, the motion is DENIED. FURTHER, IT IS ORDERED that defendant Third Wave's motion to strike portions or all of the declarations of Jonathan

Putnam is DENIED.

Entered this 28th day of December, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge